RECEIVED
JUL 2 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-6948

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JONATHAN BRUCE REED,
Appellant

v.

THE STATE OF TEXAS,
Appellee

ON APPEAL FROM
THE COURT OF CRIMINAL APPEALS
OF TEXAS

JURISDICTIONAL STATEMENT

HENRY J. ACKELS
ATTORNEY AT LAW/COUNSEL OF RECORD
MEMBER, SUPREME COURT BAR
404 LANDMARK CENTER
1801 NORTH LAMAR
DALLAS, TEXAS 75202
(214) 748-2468

J. THOMAS SULLIVAN
ATTORNEY AT LAW
UNIVERSITY OF PUGET SOUND
SCHOOL OF LAW
TACOMA, WASHINGTON 98402

ATTORNEYS FOR THE APPELLANT

QUESTIONS PRESENTED FOR REVIEW

I.

When a State trial court grants a criminal defendant under sentence of death a new trial, is the accused entitled to appellate review of his claims that the evidence adduced at the first trial was insufficient to support conviction prior to the subsequent trial?

II.

Do Articles 27.05 and 27.07 of the Texas Code of Criminal Procedure, which provide that a claim of prior jeopardy must be raised by special plea and tried to the trier of facts on the merits in the subsequent trial, respectively, deprive an accused of his right to be free from twice being placed in jeopardy for the same offense and his right to trial by an impartial jury, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution?

III.

Do Articles 40.09, Section 12 and 40.07 of the Texas Code of Criminal Procedure, which provide that the trial judge is authorized to grant new trial after review of the appellate briefs, but prohibit him from commenting on or discussing the evidence in so doing, respectively, deprive an accused of the right to present his claims of insufficient evidence to support conviction to a reviewing court and to plead his resulting acquittal, if any, in bar of further prosecution?

PARTIES

The parties in the courts below are: The Honorable Mark White, Attorney General for the State of Texas; The Honorable James K. Allen, Judge, Criminal District Court Number Five, Dallas County, Texas; The Honorable Henry Wade, District Attorney for Dallas County, Texas; and the Honorable Don Byrd, Sheriff of Dallas County, Texas.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS . . . . . ii-iii

TABLE OF AUTHORITIES iii

OPINIONS BELOW. 1

GROUNDS UPON WHICH JURISDICTION OF THE COURT IS INVOKED 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED . . 1-3

STATEMENT OF THE CASE 3

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. When a state trial court grants a criminal defendant under sentence of death a new trial, is the accused entitled to appellate review of his claims that the evidence adduced at the first trial was insufficient to support conviction prior to the subsequent trial? 5

II. Do Articles 27.05 and 27.07 of the Texas Code of Criminal Procedure, which provide that a claim of prior jeopardy must be raised by special plea and tried to the trier of facts on the merits in the subsequent trial, respectively, deprive an accused of his right to be free from twice being placed in jeopardy for the same offense and his right to trial by an impartial jury, as guaranteed by the Fifth and Sixth Amendments to the United States Constitution? 7

III. Do Articles 40.09, Section 12 and 40.07 of the Texas Code of Criminal Procedure, which provide that the trial judge is authorized to grant new trial after review of the appellate briefs, but prohibit him from commenting on or discussing the evidence in so doing, respectively, deprive an accused of the right to present his claim of insufficient evidence to support conviction to a reviewing court and to plead his resulting acquittal, if any, in bar of further prosecution? 9

CONCLUSION 11

APPENDIX

1. Order of the Court of Criminal Appeals denying leave to file Original Application for Writ of Habeas Corpus . 1a

2. Appellant's Motion for Leave to File Original Application for Writ of Habeas Corpus . 1b

3. Appellant's Original Application for Writ of Habeas Corpus (to Court of Criminal Appeals) . 1c

4. Order of Criminal District Court Number Five of Dallas County, Texas, refusing to issue Writ of Habeas Corpus . 2a

5. Application for Writ of Habeas Corpus and for of Prohibition, Criminal District Court Number Five, Dallas County, Texas . . 2b

6. Motion for Trial Court to Order Record . . 2c

7. Notice of Appeal to the ~~Texas Court of Criminal Appeals~~ S Ct of US . 3

8. Order of Criminal District Court Number Five, Dallas County, Texas, granting new trial . 4

9. Brief for the Appellant in Cause Number F78-1447-PL, on appeal from Criminal District Court Number Five, Dallas County, Texas (selected grounds of error) . 5

10. Unpublished opinion, Ex parte Huffhines, #s 60,749-60,751 (Tex.Crim.App. 1979) . . 6

TABLE OF AUTHORITIES

Abney v. United States, 431 US 651 (1977) . . . 5, 6, 7, 8, 9, 10, 12

Ayers v. State, 570 SW2d 926 (Tex.Crim.App. 1978). . 5

Baker v. Metcalfe, 633 F2d 1198 (5th Cir. 1981) . . 7-8

Benton v. Maryland, 395 US 784 (1969) 5

Burks v. United States, 437 US 1 (1978). . . . 5, 6, 11, 12

Greene v. Massey, 437 US 19 (1978). 5, 6, 11, 12

Harris v. Washington, 404 US 55 (1971) 11

Hudson v. Louisiana, ____US____ (1981) 9

Huffhines, Ex parte, #s 60,749-60,751 (Tex.Crim.App. 1979) 7, 8

Price v. Georgia, 398 US 323 (1970) 6

Waldon v. State, 579 SW2d 499 (Tex.Crim.App. 1979) . 5

OPINIONS BELOW

The orders of the Court of Criminal Appeals, denying leave for the Appellant, herein, to file his Original Application for Writ of Habeas Corpus, and the Order entered by Criminal District Court Number Five, Dallas County, Texas, refusing to issue the Writ of Habeas Corpus and Writ of Prohition sought by Appellant in that court, are included in Appendices 1a and 2a, attached to this statement. There are no reported or written opinions issued in this cause.

GROUNDS UPON WHICH JURISDICTION OF THE COURT IS INVOKED

Appellant brings appeal from an order of the Texas Court of Criminal Appeals denying his motion for leave to file an Original Application for Writ of Habeas Corpus in that Court. By this motion, Appellant had sought to raise a claim of prior jeopardy for determination prior to retrial on the merits in the cause., and review of this claim by an appellate court.

The order appealed from was issued by the Court of Criminal Appeals on April 15, 1981.

Appellant complains, herein, that certain provisions of the Texas Code of Criminal Procedure relating to claims of former jeopardy are violative of the Fifth and Sixth Amendments to the United States. Jurisdiction in this cause is conferred by 28 USC 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously

be ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Article I, Section 14, Texas Constitution provides:

"No person, for the same offense, shall be twice put in jeopardy of life or liberty, nor shall a person be again put upon trial for the same offense, after a verdict of not guilty in a court of competent jurisdiction."

The following statutory provisions are contained in designated articles of the Texas Code of Criminal Procedure:

Article 1.14:

"The defendant in a criminal prosecution for any offense may waive any rights secured him by law except the right of trial by jury in a capital felony case."

Article 27.02:

"The pleadings and motions of the defendant shall be:
(2) A special plea as provided in Article 27.05 of this code..."

Article 27.05:

"A defendant's only special plea is that he has already been prosecuted for the same or a different offense arising out of the same criminal episode that was or should have been consolidated into one trial, and that the former prosecution:
(1) resulted in acquittal;
(2) resulted in conviction;
(3) was improperly terminated; or,
(4) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution."

Article 27.07:

"All issues of fact presented by a special plea shall be tried by the trier of facts on the trial on the merits."

Article 40.07:

"In granting or refusing a new trial, the judge shall not sum up, discuss or comment upon the evidence in the case, but shall simply grant or refuse the motion, without prejudice to either party."

Article 40.08:

"The effect of a new trial is to place the cause in the same position in which it was before any trial had taken place. The former conviction shall be regarded as no presumption of guilt, nor shall it be alluded to in the argument."

Article 40.09, Section 12:

"It shall be the duty of the trial court to decide from the briefs and oral arguments, if any, whether the defendant should be granted a new trial by the trial court...."

The following statutory provisions are contained in the designated sections of the Texas Penal Code:

Section 19.03, Capital Murder:

> "(a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:
> (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson...."

Section 19.02, Murder:

> "(a) A person commits an offense if he:
> (1) intentionally or knowingly causes the death of an individual...."

Section 29.02, Robbery:

> "(a) A person commits an offense if, in the course of committing theft...and with intent to obtain or maintain control of the property, he:
> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Section 21.03, Aggravated Rape:

> "(a) A person commits an offense if he commits rape as defined in Section 21.02 of this code...and he:
> (1) causes serious bodily injury or attempts to cause death to the victim or another in the course of the same criminal episode; or
> (2) compels submission to the rape by threat of death, serious bodily injury, or kidnapping to be imminently inflicted on anyone."

Section 21.02, Rape:

> "(a) A person commits an offense if he has sexual intercourse with a female not his wife without the female's consent."

STATEMENT OF THE CASE

Appellant was tried on an indictment which alleged that he committed the offense of capital murder, as defined in Section 19.03(a)(2) of the Texas Penal Code, by intentionally committing murder while in the course of committing the offense of robbery and attempting to commit the offense of aggravated rape, Sections 29.02 and 21.03 of the Penal Code. The Appellant's motions for instructed verdict and for new trial, based on insufficient evidence, were overruled by the trial court.

Appellant then filed his appellate brief in the trial court, which included several grounds of error alleging insufficiency of evidence supporting conviction and due process violations which

would, if ruled favorably for Appellant, provide him with a bar to retrial based on double jeopardy and due process grounds. The portions of Appellant's brief raising these issues are included in the Appendix attached hereto, as Appendix 5.

After reviewing the appellate briefs, the trial court granted a new trial, pursuant to Article 40.09, Section 12, Code of Criminal Procedure. The order granting new trial, attached hereto as Appendix 4, made no disposition of the grounds of error which Appellant contends would have barred retrial in this cause, as per the requirement of Article 40.07, Code of Criminal Procedure.

Thereafter, Appellant filed his Application for Writ of Habeas Corpus and Writ of Prohibition in the trial court, requesting relief from the requirement that Appellant stand trial a second time before the issues providing a potential jeopardy bar be reviewed by an appellate court. The pleading is attached hereto as Appendix 2b. In response, the trial court refused to issue the writ and entered its order, included as Appendix 2a, which expresses the trial court's conclusion that Appellant can only present his prior jeopardy claim by special plea tried in the subsequent trial and such a claim may not be litigated by Writ of Habeas Corpus.

Appellant then filed his motion for leave to file an Original Application for Writ of Habeas Corpus in the Court of Criminal Appeals. The motion for leave is included as Appendix 1b and the Original Application for the writ is included, herein, as Appendix 1c. The Court of Criminal Appeals entered an order on April 15, 1981, denying leave to file the application for habeas relief, which is included herein as Appendix 1a.

In both the applications for habeas relief, presented to the trial court and the Court of Criminal Appeals, Appellant presented his claim that the special plea requirement of Article 27.05, Code of Criminal Procedure, is violative of the Double Jeopardy Clause of the Fifth Amendment and potentially violated of the Sixth Amendment's guarantee of trial by an impartial jury.

From the denial of habeas relief in the Texas courts, Appellant brings this appeal, requesting the Court extend the rule of

Abney v. United States,431 US 651 (1977) to state prosecutions. Appellant's notice of appeal, filed in the Court of Criminal Appeals of Texas, is included herein as Appendix 3.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

Appellant first contends that an accused in a criminal prosecution has a right to exerise all benefits and rely on all protections secured to him by the provisions of the United States Constitution. Critical among these protections is the Fifth Amendment's guarantee that an accused shall not twice be put to trial and subject to jeopardy for the same offense.

In Burks v. United States, 437 US 1 (1978) and Greene v. Massey, 437 US 19 (1978), this Court held that a conviction based upon legally insufficient evidence requires reversal by the reviewing court. The disposition of the cause is properly the entry of judgment of acquittal, which may be pleaded in bar by the accused in any subsequent prosecution based on the same offense.

Greene applied the rule announced in Burks to state prosecutions, based upon application of the Double Jeopardy prohibition to state proceedings in Benton v. Maryland, 395 US 784 (1969). The rule has been applied in Texas prosecutions by the Court of Criminal Appeals in reversing convictions based upon insufficient evidence claims. Ayers v. State, 570 SW2d 926 (Tex.Crim.App. 1978); Waldon v. State, 579 SW2d 499 (Tex.Crim.App. 1979).

Critical to enjoyment of the Double Jeopardy protection afforded by the Fifth Amendment, of course, is availability of a procedural device for litigating prior jeopardy claims. In Abney v. United States, a unanimous Court held that an accused is entitled to have his claim of prior jeopardy litigated and reviewed prior to undergoing a second trial on the merits. 431 US 651 (1977).

Writing in Abney, the Chief Justice ably observed:

"Finally, the rights conferred on a criminal accused

> by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to trial for the same offense." (original emphasis).
>
> 431 US 650-651.

The Court's reasoning in Abney has been extended to state prosecutions, requiring the states to recognize that the Double Jeopardy Clause applies not only to a second conviction, but to the threat of twice being put in jeopardy, or being subjected to a second trial. Price v. Georgia, 398 US 323 (1970).

Procedurally, Appellant contends that a litigant in state court must be afforded a mechanism which will provide a determination of insufficiency of evidence complaints arising in the first trial prior to being put to trial a second time after reversal. In order to give effect to the rule of Burks v. United States, it is essential that all claims arising from the first trial which would, if decided favorably to the accused, result in a bar to retrial be heard prior to the subsequent trial. Otherwise, the application of Burks and Greene v. Massey in those cases in which a conviction is obtained on insufficient evidence will become mired in the procedural morass which Abney and Price, by reform of procedure for pleading prior jeopardy, avoid.

Appellant, thus, argues that the procedural reform for presenting and securing appellate review of prior jeopardy claims must be applied to disposition of insufficiency of evidence claims, so as to afford a criminal accused an opportunity to plead the former conviction and subsequent reversal in bar.

Texas procedure provides no interlocutory appellate review of prior jeopardy claims. A Texas defendant who seeks to raise such a claim must do so by a special plea, Article 27.05, Code of Criminal Procedure, which is tried in the trial

on the merits. This procedure for resolving the issue of prior jeopardy has been considered and found defective by the Fifth Circuit Court of Appeals when compared with the language of Abney. Baker v. Metcalfe, 633 F2d 1198 (5th Cir. 1981), 1200-1201, fn. 3.

When Appellant sought to use the Writ of Habeas Corpus to present his claim of prior jeopardy in state court, both the trial court and the Court of Criminal Appeals refused to issue the Writ, denied him a hearing on his claim and, thereby, denied his requested relief. Full application of Abney to the states would require adoption of some procedure, whether by interlocutory appeal or by extraordinary writ, for determination of prior jeopardy claims. Insofar as Texas procedure fails to afford review through either, it runs afoul of the Double Jeopardy Clause.

Hence, Appellant appeals the denial of leave to file his Original Application for Writ of Habeas Corpus to this Court.

II.

Appellant contends that the Texas statutory procedure for raising and determining claims of prior jeopardy, the special plea defined in Article 27.05, Code of Criminal Procedure, violates the guarantee of the Fifth Amendment against twice being put to trial for the same offense. The special plea is the only procedure recognized by statute for raising the plea of prior jeopardy and the Court of Criminal Appeals has ruled that it is the only procedure which may be utilized in this respect, rejecting a claim that the Writ of Habeas Corpus would be appropriate for this purpose. The Court's opinion in Ex parte Huffhines, an unpublished opinion included as Appendix 6, attached hereto, discusses and rejects alternatives to the special plea for raising a claim of former jeopardy in Texas.

Similarly, in Baker v. Metcalfe, supra, the Fifth Circuit observed in footnote 3, at pages 1200-1201:

> "...there is no Texas state procedure by which petitioners may seek pretrial determination of their double jeopardy claim. Under Texas statutory procedure, the facts concerning special pleas are tried in the same proceeding as the trial on the merits. Former jeopardy is the only special plea available to a defendant under the law...."

The conclusion of the Fifth Circuit is reflected by the facts in in Baker. The petitioners had attempted to secure a pretrial determination of their prior jeopardy claim by Special Plea of Double Jeopardy which was overruled. The cause was then set for trial and petitioners sought habeas relief in federal court and a stay of the state court proceedings, both of which were granted by the District Court. 633 F2d 1200.

Both Huffhines and Baker serve to explain the Court of Criminal Appeals' refusal to grant Appellant's motion for leave to file his Original Application for Writ of Habeas Corpus in that court. The Court, denying the motion for leave relied on its previously stated position in Huffhines that the Writ of Habeas Corpus is not a proper vehicle for asserting prior jeopardy claims.

The trial court, in which Appellant had first sought relief through extraordinary writ to raise his prior jeopardy claim, expressed the same posture. The trial court concluded that the issue raised was one which must be appealed from a conviction, thus requiring Appellant to undergo a second trial in order to have his contentions that the first conviction rested on insufficient evidence determined by an appellate court. See Appendix 2a, attached hereto.

If Article 27.05 of the Code of Criminal Procedure provides the only statutory mechanism for raising the claim of prior jeopardy, as the opinions conclude, then Appellant is deprived of an appellate determination of his prior jeopardy claim before being put to trial a second time. Since a determination that the evidence supporting the first verdict was, in law, insufficient, Appellant should be entitled to resolution of the issue in order to avoid a subsequent trial, as Abney holds.

No procedure is recognized in Texas, however, for determination of insufficiency claims prior to subsequent trials when a new trial, generally, is granted by the trial court.

An additional constitutional dilemma is created where the prior jeopardy claim is raised and includes an issue of material fact. Article 27.07 of the Code provides that issues of fact raised by the plea of former jeopardy are to be tried to the trier

of fact in the subsequent trial on the merits. Since the trier of fact in a capital prosecution is mandated by Article 1.14, Texas Code of Criminal Procedure, to be the jury, an accused raising such an issue of fact in support of his prior jeopardy claim of necessity will be forced to advise the second jury that he has already suffered one conviction for the offense.

Appellant contends, therefore, that the statutory scheme for presentation of prior jeopardy claims fails to provide an adequate mechanism, in light of the constitutional command of Abney, for preserving the right to not be twice placed in jeopardy for the same offense.

III.

Appellant contends, finally, that the disposition of his appeal in this cause demonstrates the extent to which Texas procedure serves to deprive him of an opportunity to litigate the issue of insufficiency of evidence and use the resulting decision in bar. Appellant was granted a new trial by the trial judge after his review of the appellate briefs, pursuant to Article 40.09, Section 12, Code of Criminal Procedure. The order of the trial court granting new trial appears attached hereto as Appendix 4.

The order granting new trial by the trial court makes no disposition of Appellant's claims that insufficient evidence supported the conviction obtained in his first trial. As Appellant petitioned in his brief, a favorable disposition of these claims would have afforded him a bar to further prosecution. The silence of the trial court with respect to these claims is in accord with Article 40.07, Code of Criminal Procedure, which precludes discussion of the evidence offered at trial. Thus, the remedy ultimately made available to the petitioner in Hudson v. Louisiana, ___US___ (1981), as a result of the comments of the trial judge in granting new trial in that case, has not been made applicable in this case since the trial judge complied fully with the statutory requirement of Article 40.07.

Texas procedure thus permits the trial court to terminate appellate review of a conviction by entering an order granting

a new trial. Further, the statutes conspire to preclude resolution of those issues which will afford an accused a bar to further prosecution, if decided in his favor, by precluding any comment on the evidence in granting the new trial.

In Abney the Court held that orders disposing of jeopardy claims in the trial court constituted "final orders" for purposes of affording litigants immediate access to appellate review. There Court concluded:

> "...Our conclusion that a defendant may seek immediate appellate review of a district court's rejection of his double jeopardy claim is based on the special considerations permeating claims of that nature which justify a departure from the normal rule of finality."
>
> 431 US 663.

Of course, Appellant faces an even less favorable situation since the grant of a new trial by the trial court fails to provide any basis for review.

Additionally, when Appellant sought to raise his claim of prior jeopardy by Application for Writ of Habeas Corpus in the trial court, that court declined to issue the writ and hold a hearing on same. The order entered, refusing to issue the writ, was a non-appealable order under Texas procedure. Appellant filed in the trial court a motion requesting that the trial court order the record prepared and forwarded to the Court of Criminal Appeals for appellate review, Appendix 2c, after the trial court entered its order, expressing the court's opinion that the refusal to issue the Writ of Habeas Corpus is non-appealable. See Appendix 2a, attached hereto. The motion was denied.

According to the trial court's order, appellate review of the prior jeopardy claim would be available only on the appeal of the subsequent conviction.

Thus, Texas procedure effectively denies appellate review to a litigant raising issues of insufficiency of evidence in the event the trial court acts, under Article 40.09, Section 12, to grant a new trial. First, the litigant is denied review of the grounds of evidence raising the objections based on insufficiency of the evidence. Second, any pretrial motion to plead the prior judgment in bar, based on the claim that the insufficient evidence

to the Court's decision in Burks, must be reviewed after a second conviction. No vehicle exists in the Code of Criminal Procedure for determination of those claims, by an appellate court, which would lead to a bar to further prosecution, prior to a subsequent trial. Such a procedural system particularly injures those litigants who are forced to undergo a second trial which results in acquittal, since the proper review of an insufficient evidence claim after the first trial would have precluded the second trial.

The Fifth Amendment's protection against double jeopardy requires the state to develop a procedure for determining the merits of those claims which would bar retrial prior to having the accused undergo a second trial. By permitting the trial court to circumvent appellate review in the granting of a new trial, without disposing of the sufficiency of evidence claims, Texas procedure imposes an impermissible burden on the accused to endure retrial before having his double jeopardy claim ruled upon by an appellate court.

Appellant contends that the rule of Burks and Greene v. Massey, that reversal based upon insufficient evidence will bar retrial, requires the states to develop appellate remedies for determining such claims. Interlocutory appellate review or availability of the Writ of Habeas Corpus could provide such a mechanism for review. Regardless of what device the state may choose to adopt, an accused must be afforded such a determination by an appellate court so that the ruling, if favorable, may be pleaded in bar of further prosecution.

CONCLUSION

This Court has previously reviewed state treatment of double jeopardy issues. Review in Harris v. Washington, 404 US 55 (1971) was granted to consider a state court determination inconsistent with the guarantees contained in the Fifth Amendment. The Court heard the case, observing that jurisdiction had properly been invoked under 28 USC 1257, the same statutory provision relied upon by Appellant herein.

The thrust of Appellant's claim arises from the interpretations of the Double Jeopardy Clause and insufficiency of evidence claims in Burks and Greene v. Massey. Because these decisions provide successful litigants with a bar to further prosecution, state appellate procedure must accomodate resolution of sufficiency issues so that an accused may rely on the judgment to plead in bar. The impact of Abney is clear in this respect: if an accused is to properly assert a double or prior jeopardy claim for determination prior to a second trial, then his sufficiency of evidence claims must be adjudicated by an appellate court in advance of the second trial.

Texas procedure fails to afford Appellant either a procedure by which his sufficiency of evidence claims may be decided prior to retrial, or a procedure for having appellate review of the double jeopardy claim, itself, prior to appeal from the subsequent conviction, if any. As a consequence, Texas procedure offends the Double Jeopardy Clause of the Fifth Amendment, infringing as well on Appellant's right to due process of law and potentially, his right to retrial before an impartial jury. Because the guarantees of the Fifth and Sixth Amendments are denied Appellant by the aforementioned defects in Texas procedure, Appellant moves the Court that probable jurisdiction should be noted in this cause.

Respectfully submitted,

HENRY J. ACKELS
ATTORNEY AT LAW/COUNSEL OF RECORD
MEMBER, SUPREME COURT BAR
404 LANDMARK CENTER
1801 NORTH LAMAR
DALLAS, TEXAS 75202
(214) 748-2468

J. THOMAS SULLIVAN
ATTORNEY AT LAW
UNIVERSITY OF PUGET SOUND
SCHOOL OF LAW
TACOMA, WASHINGTON 98402

ATTORNEYS FOR THE APPELLANT

WRIT NO. 10,214

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

EX PARTE JONATHAN BRUCE REED - - - Original Application for Writ of Habeas Corpus from Dallas County

O R D E R

Leave to file petitioner's Original Application for Writ of Habeas Corpus arising out of cause number F79-1447-PL and F81-1988-PL in Criminal District Court Number Five of Dallas County is denied.

It is so ordered this 15th day of April, 1981.

PER CURIAM

En Banc

A True Copy
Attest:
Thomas Lowe, Clerk
Court of Criminal Appeals of Texas

By: Gray Lemett

Deputy

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

EX PARTE §
§ CAUSE NUMBER_____
JONATHAN BRUCE REED §

MOTION FOR LEAVE TO FILE
ORIGINAL APPLICATION FOR
WRIT OF HABEAS CORPUS

(Accompanying Original Application for Writ of Habeas Corpus)

TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

This application for leave to file an original application for writ of habeas corpus is brought by JONATHAN BRUCE REED, Applicant herein, by and through his attorneys of record in this cause, HENRY J. ACKELS and J. THOMAS SULLIVAN. Applicant would show that he has previously been denied habeas relief by Criminal District Court Number Five of Dallas County, Texas, in which court is pending a capital murder indictment against him in Cause Number F81-1988-PL. (See Exhibits 4-5, attached to Application for Writ of Habeas Corpus).

Applicant contends in his application for the writ that he is illegally constrained in the Dallas County Jail by virtue of the capital indictment. Applicant has previously been tried for this offense and convicted, the trial court granting a new trial based on his appellate brief. Applicant's four grounds of error challenging sufficiency of evidence supporting his conviction have not been reviewed by an appellate court and Applicant is, therefore, denied the benefits guaranteed him should a reviewing court conclude that any or all of the four grounds are correct and enter judgment of acquittal in his behalf. Such a ruling would bar re-prosecution on the instant indictment.

Applicant moves the Court grant his request for leave to file his Application for Writ of Habeas Corpus, issue the writ and grant his requested relief.

Respectfully submitted,

Henry Ackels

HENRY J. ACKELS/TEXAS BAR# 00829950
ATTORNEY FOR APPLICANT
404 LANDMARK CENTER
1801 NORTH LAMAR
DALLAS, TEXAS 75202
(214) 748-2468

RECEIVED IN
COURT OF CRIMINAL APPEALS

APR 14 1981

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS

APR 14 1981

Thomas Lowe, Clerk

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
AUSTIN, TEXAS

EX PARTE §
§ CAUSE NUMBER_____
JONATHAN BRUCE REED §

ORIGINAL APPLICATION FOR
WRIT OF HABEAS CORPUS

TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

This application for habeas relief is brought by JONATHAN BRUCE REED, Applicant herein, by and through his attorneys of record in this cause, HENRY J. ACKELS and J. THOMAS SULLIVAN. Applicant petitions this Honorable Court to issue its writ and grant his application for relief. Applicant would show unto the Court the following grounds supporting his claim that he is presently restrained of his liberty, in violation of the law, by DON BYRD, Sheriff of Dallas County, Texas, in the Dallas County Jail. Sheriff Don Byrd is Respondent herein.

I.

Applicant is presently held in custody in solitary confinement in the Dallas County Jail, Dallas, Texas, pending trial for the offense of capital murder in Cause Number F81-1988-PL, now pending in Criminal District Court Number Five, Dallas County, Texas. The indictment in Cause Number F81-1988-PL is a re-indictment for the same offense, previously indicted in Cause Number F79-1447-PL. (Indictment, Cause Number F81-1988-PL, attached, Exhibit 1).

II.

Applicant was convicted of the offense of capital murder in Cause Number F79-1447-PL in Criminal District Court Number Five and the case was appealed, pursuant to Article 37.071(f), Texas Code of Criminal Appeals. After filing of Appellant's brief, Appellee filed its brief urging the trial court grant Appellant a new trial, based on the authority of Adams v. Texas, ___US___(1980). The trial court, pursuant to the authority of Article 40.09(12), Texas Code of Criminal Procedure, entered an order granting Appellant/Applicant a new trial in said cause. (Order, attached, Exhibit 2).

III.

In his appellate brief, Applicant had raised four grounds of error alleging that the evidence was insufficient to support the jury's verdict of guilty. (Appellant's brief, Cause Number F79-1447-PL, Grounds of Error Numbers 1, 2, 3, and 4, attached, Exhibit 3). In entering its order granting Applicant a new trial in said cause, the trial court made no finding in regard to the sufficiency of evidence issues raised in the appellant's brief, stating no reason for the granting of the new trial.

IV.

Applicant contends that his confinement in the Dallas County Jail is illegal for the following reasons:

A.

In Grounds of Error Numbers 1, 2, 3, and 4 in Applicant's brief on appeal, issues relating to sufficiency of the evidence supporting the jury's finding of guilty were presented for review. The trial court, in granting Applicant a new trial, did not specify the basis for its decision that reversible error had been committed during the course of the trial. Applicant contends that he is entitled to a presumption that the trial court granted new trial on his initial ground of error, which alleged that the evidence was insufficient to support conviction for the offense of capital murder.

If, in fact, the evidence was insufficient to support conviction, Applicant could not be retried for capital murder, based upon the same fact complex. Thus, Applicant's current confinement on a capital indictment is unlawful.

B.

Applicant second contends that even if not entitled to a presumption that the grant of new trial was based upon his initial ground of error, he is, at the least, entitled to a review of the grounds of error raising the issue of insufficient evidence and a ruling thereon. Abney v. United States, 431 US 651 (1977).

A finding of insufficient evidence to support conviction results in acquittal of the offense charged and serves as a bar

to further prosecution. Burks v. United States, 437 US 1 (1978); Greene v. Massey, 437 US 19 (1978); Ayers v. State, 570 SW2d 926 (Tex.Crim.App. 1978).

Since a finding of insufficient evidence provides a bar to further prosecution, Applicant has been denied an essential element of the protection against twice being placed in jeopardy for the same offense as a result of the trial court's action in granting new trial without ruling on the sufficiency of evidence grounds of error. The Fifth Amendment being a guarantee against twice being put to trial for the same offense, this protection is significantly undermined if appellate review of double jeopardy claims is postponed until after the second trial. Abney, supra.

C.

Applicant further contends that without interlocutory review of his grounds asserting that his conviction was not supported by sufficient evidence, he is required, by statute to present the plea of prior jeopardy in accord with the provisions of Article 27.05, Texas Code of Criminal Procedure. The special plea mechanism created by this statutory provision requires that prior jeopardy be litigated before the trier of fact in a subsequent prosecution. Article 27.07, Texas Code of Criminal Procedure.

Applicant contends that Articles 27.02(2), 27.05 and 27.07, of the Texas Code of Criminal Procedure violate the provisions of the Fifth Amendment protecting an accused against double jeopardy and the Sixth Amendment guarantee of trial by an impartial jury.

Because a jury may not be waived in a capital prosecution in Texas, Article 1.14, Texas Code of Criminal Procedure, as in all other prosecutions, Applicant would show that the guarantee of trial by an impartial jury is impaired by the requirement that the special plea of prior jeopardy be presented to the jury in the subsequent prosecution. Under the provisions governing the special plea of prior jeopardy, Applicant would be compelled to inform his capital jury that he had previously been convicted of the offense by another jury. Prejudice to Applicant is implicit on the face of this procedure.

The special plea procedure created by the Legislature is offensive to the Fifth and Sixth Amendments of the United States Constitution and, thus, Applicant's rights under these Amendments are not adequately protected by applicable Texas law.

D.

Applicant contends, fourth, that despite the grant of new trial by the trial court in this cause, his appellate rights have been impaired by the unconstitutional application of Article 40.09 (12), Texas Code of Criminal Procedure. Applicant does not contend that the trial court failed to comply with the provision, but that the provision is inadequate to provide him with appellate review of his sufficiency of evidence grounds by a court not previously having heard the case. Under this provision, the trial court is charged with the responsibility of determining whether new trial should be granted, based on the grounds of error raised in the appellant's brief and the response, if any, by the State.

Not only does the provision fail to direct the trial court to specifically consider and decide issues of sufficiency of the evidence, but it does not authorize that any such consideration be undertaken by a court other than that which held the trial. Applicant contends that had the trial court ruled specifically that the evidence was sufficient in each of the four instances and respects raised in his brief, he would still have to be accorded appellate review of the trial court's decision. Abney, supra.

Thus, Article 40.09(12) violates Applicant's right to be free from twice being placed in jeopardy for the same offense as it is applied in this case, since it permits the trial court to frustrate appellate review of insufficient evidence points by authorizing the trial court to grant a new trial without alluding to disposition of the insufficient evidence grounds. In fact, Article 40.07, Texas Code of Criminal Procedure, precludes the trial court from making such disposition with accompanying reasoning. This provision makes discussion of the sufficiency of the evidence by the trial court improper and thus, any limited review of evidentia sufficiency by the trial court, conducted pursuant to Article 40.09(1

expressly fails to guarantee that the accused's claim of insufficient evidence can be decided by the trial court.

E.

Applicant would show, further, that he has previously sought to raise his double jeopardy claim by making application to the trial court for writ of habeas corpus, raising the issues presented herein. (Application for Writ of Habeas Corpus, Exhibit 4). The trial court refused to issue the writ. (Order, Exhibit 5). In its order refusing issuance of the writ, the trial court expressly stated its conclusion that Applicant's claim of prior jeopardy could only be addressed on direct appeal after the subsequent conviction. This position does not comport with the Supreme Court's observation that the Double Jeopardy Clause protects not only against a second conviction, but against a second trial. Abney, supra. An order by a trial court refusing to issue the writ of habeas corpus is not appealable.

PRAYER

Wherefore, Applicant contends, based upon the foregoing grounds, that his confinement pursuant to the capital indictment in this cause is invalid, in that Applicant's right to be free from double jeopardy and right to impartial jury trial, protected by the Fifth and Sixth Amendments to the United States Constitution are compromised by procedures governing presentation of prior jeopardy claims created by Texas statutes;

Wherefore, premises considered, Applicant prays this Honorable Court issue the Writ of Habeas Corpus requested herein and grant Applicant hearing and relief from his illegal restraint in the custody of the Sheriff of Dallas County, Texas, Respondent herein, and to such other relief to which Applicant may be entitled in law or equity.

Respectfully submitted,

Jonathan B Reed

JONATHAN BRUCE REED, APPLICANT

HENRY J. ACKELS/TEXAS BAR# 00829950
ATTORNEY AT LAW
404 LANDMARK CENTER
1801 NORTH LAMAR
DALLAS, TEXAS 75202
(214) 748-2468

J. THOMAS SULLIVAN/TEXAS BAR# 19482500
ATTORNEY AT LAW
P.O. BOX 140774
DALLAS, TEXAS 75214

ATTORNEYS FOR THE APPLICANT

STATE OF TEXAS §
§
COUNTY OF DALLAS §

AFFIDAVIT

BEFORE ME, THE UNDERSIGNED AUTHORITY, appeared JONATHAN BRUCE REED, and who being by me duly sworn did depose and state on his oath as follows:

"My name is JONATHAN BRUCE REED. I am the Applicant in the above styled cause and in the foregoing Application for Writ of Habeas Corpus. I have read the above and foregoing Application consisting of this and five other typewritten pages and swear that the allegations and statements of fact contained therein are true and correct."

JONATHAN BRUCE REED, AFFIANT

SUBSCRIBED AND SWORN TO before me this 13th day of April, 1981.

NOTARY PUBLIC IN AND
FOR DALLAS COUNTY, TEXAS

My commission expires:

2-27-85

TRUE BILL — Form 223-J CAP MUR REIND wm/10-19-51

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, the Grand Jurors, good and lawful men of the County of Dallas and State of Texas, duly elected, tried, impaneled, sworn and charged to inquire of offenses committed within the body of the said County of Dallas, upon their oaths do present in and to the 203rd Judicial District Court of Dallas County, at the January Term, A.D. 19 81, of said Court that one JONATHAN BRUCE REED, hereinafter styled defendant,

on or about the 1st day of November in the year of our Lord One Thousand Nine Hundred and 78 in the County and State aforesaid, did then and there unlawfully

and intentionally cause the death of an individual, Wanda Jean Wadle, hereinafter styled complainant, by strangling her with a belt, by strangling her with a plastic bag and by strangling her with a telephone cord, and the defendant did then and there intentionally cause the death of the complainant in the course of committing and attempting to commit robbery of the complainant and in the course of attempting to commit aggravated rape of the complainant,

contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State.

George P. Gallagher
Foreman of the Grand Jury.

HENRY WADE
Criminal District Attorney of Dallas County, Texas

E-81 1988 PL

NO. F79-1447-PL

EX PARTE	|	IN CRIMINAL DISTRICT
	|	COURT NO. 5 OF
JONATHAN BRUCE REED	|	DALLAS COUNTY, TEXAS

ORDER ON APPLICATION FOR WRIT OF HABEAS CORPUS AND WRIT OF PROHIBITION

Petitioner was found guilty of the offense of capital murder and assessed the punishment of death by a jury in Cause No. F79-1447-PL in Criminal District Court No. 5 of Dallas County, Texas.

On November 21, 1980, the Court, having before it the record on appeal in the above styled and numbered cause and the Court, having examined the record and the briefs filed both by the Petitioner formed the opinion that the Petitioner should be granted a new trial pursuant to Art. 40.09, Sec. 12, C.C.P. The Court thereupon entered an order that the verdict and judgment of conviction rendered in Cause No. F79-1447-PL be set aside and vacated and granted Petitioner a new trial in said cause.

Petitioner remains in custody under indictment for the offense of capital murder in Cause No. F79-1447-PL pending trial before this Court. By means of the extraordinary writs of habeas corpus and prohibition, Petitioner seeks to avoid the new trial which he requested.

Upon a new trial and, if convicted, the Petitioner may raise on direct appeal those matters which he has raised in the writ petitions.

Extraordinary writs may not be used as a substitute for direct appeal. Powell v. State (1977) 558 S.W.2d 480.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED by the Court that the applications of the Petitioner, Jonathan Bruce Reed, herein be denied and the issuance of the writs applied for is in all things refused.

ENTERED THIS THE 3rd day of March, 1981.

James K. Allen

JAMES K. ALLEN, JUDGE
CRIMINAL DISTRICT COURT NO. 5
DALLAS COUNTY, TEXAS

FILED
JAN 5 1981
T. E. MOORE
DIST. CLERK, DALLAS CO., TEXAS
DEPUTY

NO. F79-1447-PL

EX PARTE () CRIMINAL DISTRICT

() COURT NO. 5

JONATHAN BRUCE REED () DALLAS COUNTY, TEXAS

APPLICATION FOR WRIT OF HABEAS CORPUS AND
APPLICATION FOR WRIT OF PROHIBITION

TO THE HONORABLE JUDGE JAMES K. ALLEN:

This application is made by JONATHAN BRUCE REED, Petitioner herein, by and through his attorneys of record in this cause, HENRY J. ACKELS and J. THOMAS SULLIVAN, who complains of the unlawful restraint of your Petitioner by Sheriff Don Byrd, Sheriff of Dallas County, Texas.

I.

Petitioner is restrained of his liberty unlawfully by being confined in the Dallas County Jail on an indictment alleging that he committed the offense of capital murder. Petitioner would show that he has previously been tried on this indictment in Cause Number F79-1447-PL in Criminal District Court Number Five and that his jury trial resulted in conviction and the punishment was assessed by the jury at death.

II.

In accord with the provisions of Article 37.071(f), Texas Code of Criminal Procedure, Petitioner's conviction in Cause Number F79-1447-PL was appealed to the Texas Court of Criminal Appeals. On motion of the State, which joined in Petitioner's allegation of error on the part of the trial court, a new trial was granted in this cause by the Honorable James K. Allen, Judge of the Criminal District Court Number Five, Dallas County, Texas.

Petitioner remains confined in the Dallas County Jail pursuant to the same indictment in Cause Number F79-1447-PL, and remains charged with the offense of capital murder.

III.

Petitioner contends that his confinement in the Dallas County Jail pursuant to the capital indictment now pending in Cause Number F79-1447-PL is illegal for the following reasons:

1) In grounds of error numbers 1, 2, 3, and 4 in Petitioner's brief on appeal in this cause, (true and correct copies of which are attached hereto as Exhibit A and incorporated herein by reference for all purposes,) Petitioner raised issues for consideration relating to the sufficiency of evidence offered to support conviction. In granting its order for new trial, (a copy of which is attached hereto as Exhibit B,) the trial court did not expressly address these grounds of error and granted a new trial generally, without any statement of grounds therefor. Petitioner contends that he is entitled to a presumption, in absence of evidence to the contrary, that the trial court concurred with the Petitioner that the evidence was, in fact, insufficient to support conviction for a capital offense.

Thus, Petitioner could not be subsequently prosecuted for the offense of capital murder under the indictment upon which he was tried and convicted, since the evidence was insufficient to support conviction. The present confinement of Petitioner on an indictment for the same capital offense for which he has previously been tried is therefore, illegal.

2) Even if Petitioner is not entitled to a presumption

that the trial court ruled the evidence insufficient, supporting his contentions on appeal, Petitioner contends that he has been deprived of a significant right by the failure of the trial court to rule on his grounds of error raising issues which would bar re-trial in this cause. Petitioner contends that he is entitled to a ruling on his sufficiency of evidence grounds of error pursuant to the decisions of the United States Supreme Court in Burks v. United States, 437 US 1 (1978) and Greene v. Massey, 437 US 19 (1978), the Texas Court of Criminal Appeals in Ayers v. State, 570,SW2d 926 (Tex.Crim.App. 1978). Since a reversal based upon insufficient evidence has been held to bar re-trial on the Constitutional theory of Double Jeopardy, Petitioner contends that the trial court's failure to consider and rule on these contentions, properly presented for review, constitutes an abridgment of his Fifth Amendment right to be free from twice being placed in jeopardy on the same offense.

3) Petitioner further contends that the requirements of the Code of Criminal Procedure in Articles 27.02, 27.05 and 27.07, are inappropriate and result in an abridgment of his constitutional rights. Insofar as the Code requires that he raise his prior jeopardy issue by way of filing a special plea in bar to any further prosecution, Petitioner must then present his special plea by way of verified pleading to the trier of fact in a subsequent trial on the merits. Article 27.07, Texas Code of Criminal Procedure.

In a capital prosecution, the accused may not elect to waive jury trial, as he may in all other cases. Article 1.14, Texas Code of Criminal Procedure. Therefore, Petitioner is

required to present his special plea regarding sufficiency of evidence in the first trial and make his factual arguments supporting his plea to the same jury which will consider the evidence in his re-trial. Such a procedure is clearly calculated to prejudice his jury against him by notifying the jurors that a prior jury has already convicted him and imposed the death penalty. Such a procedure violates his right to a fair trial by an impartial jury as guaranteed him by Article 1, Section 10 of the Texas Constitution and the Sixth Amendment to the United States Constitution.

Petitioner contends, therefore, that the confinement on this capital indictment is invalid in that Petitioner's Constitutional rights under both the Texas and United States Constitutions are comprised by procedures which govern presentation of prior jeopardy claims in criminal prosecutions.

WHEREFORE, PREMISES CONSIDERED, Applicant herein, moves that the Honorable Court grant and issue a Writ of Habeas Corpus and order his discharge from custody and restraint under the capital indictment currently pending in this cause. Applicant further moves for such relief to which he is entitled in law and equity and specifically moves the Honorable Court to enter its order of prohibition, restricting the Criminal District Attorney of Dallas County, Texas from proceeding to trial on a capital indictment in this cause and prohibiting the Criminal District Attorney of Dallas County, Texas from seeking any reindictment of Applicant for a capital offense based on the facts alleged in the indictment in this cause. Wherefore, Applicant prays his requested relief be granted.

DATED: January 5, 1981

Respectfully Submitted,

Jonathan B Reed
JONATHAN BRUCE REED, PETITIONER

Henry J. Ackels
HENRY J. ACKELS,
ATTORNEY FOR PETITIONER
404 Landmark Center
1801 North Lamar Street
Dallas, Texas 75202
(214) 748-2468

J. THOMAS SULLIVAN,
ATTORNEY FOR PETITIONER
1824 S. Interregional Highway, #246
Austin, Texas 78704
(512) 443-4133

STATE OF TEXAS X
X
COUNTY OF DALLAS X

AFFIDAVIT

BEFORE ME, THE UNDERSIGNED AUTHORITY, appeared JONATHAN BRUCE REED, and who being by me duly sworn did depose and state on his oath as follows:

"My name is JONATHAN BRUCE REED, I am the Petitioner in the above cause. I have read the above and foregoing Application for Writ of Habeas Corpus consisting of this and other typewritten pages and swear that the allegations and statements of fact contained therein are true and correct.

Jonathan B Reed
JONATHAN BRUCE REED, AFFIANT

SUBSCRIBED AND SWORN TO before me this 5th day of January, 1981.

Cynthia C. Hall
NOTARY PUBLIC IN AND FOR
DALLAS COUNTY, TEXAS

FILED
MAR 17
T. E. MOORE
DALLAS CO., TEXAS

CAUSE NO. F81-1988-PL

EX PARTE	§	IN CRIMINAL DISTRICT
	§	
	§	COURT NUMBER FIVE
	§	
JONATHAN BRUCE REED	§	DALLAS COUNTY, TEXAS

MOTION FOR COMPLIANCE
WITH ARTICLE 44.34, CCP

TO THE HONORABLE JUDGE JAMES K. ALLEN:

Petitioner, applicant herein, JONATHAN BRUCE REED, by and through his attorneys of record in this cause, move the Court order compliance with Article 44.34, Texas Code of Criminal Procedure, for the purpose of guarantying Petitioner's right of appeal conferred under said statute. Petitioner would show the following:

I.

Petitioner sought relief by writ of habeas corpus in this Court in the preceding cause, F79-1447-PL (preceding re-indictment in Cause No. F81-1988-PL), alleging violations of his constitutional right to be free from double jeopardy. The writ was heard and denied by the Court by its order of March 3, 1981.

II.

On March 11, 1981, counsel for Petitioner, HENRY J. ACKELS, appeared in open Court and gave oral notice of appeal from the Court's order denying habeas relief. Counsel requested the Court order the record be prepared and forwarded to the Court of Criminal Appeals in Austin, Texas, for purposes of appealing the adverse ruling. The Court advised counsel at that time that it was of the opinion that the matter was not appealable and refused to order the record prepared.

III.

Petitioner would show that pursuant to Article 44.34, Texas Code of Criminal Procedure, that a statutory right of appeal from an adverse decision on application for writ of habeas corpus has been created by an act of the Legislature; that the statute further provides that the record, including all testimony offered, be prepared and forwarded to the Texas Court of Criminal Appeals;

IN THE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

EX PARTE *

*

* WRIT NO. 10,214

*

JONATHAN BRUCE REED *

NOTICE OF APPEAL TO SUPREME COURT
OF UNITED STATES

TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS:

Applicant, JONATHAN BRUCE REED, hereby gives notice of appeal to the Supreme Court of the United States of America, pursuant to 28 USC § 1257 (2), appealing the order of this Court, in the above styled and numbered cause of action, denying leave to file applicant's Original Application for Writ of Habeas Corpus ordered and entered on April 15, 1981, Per Curiam, en banc.

Respectfully submitted,

Henry Ackels

HENRY J. ACKELS
Attorney for Applicant
404 Landmark Center
1801 No. Lamar
Dallas, Texas 75202
(214) 748-2468

J. Thomas Sullivan

J. THOMAS SULLIVAN
Attorney for Applicant
P. O. Box 140774
Dallas, Texas 75214

RECEIVED IN
COURT OF CRIMINAL APPEALS
JUN 09
Thomas Lowe, Clerk

and that the record is to be prepared and forwarded to the Court of Criminal Appeals within 15 days after entry of the judgment appealed from, unless an extension be granted by the Court of Criminal Appeals for good cause shown.

IV.

Petitioner contends that failure of the Trial Court to comply with and order compliance with Article 44.34, CCP, will result in a denial of the statutory right of appeal in such cases and will irreparably injure him in failing to afford him an opportunity to have heard by the appellate court his legal claims made in the application for writ of habeas corpus.

WHEREFORE, PREMISES CONSIDERED, Petitioner moves the Honorable Court order compliance with Article 44.34, CCP and order the record prepared and forwarded to the Court of Criminal Appeals in Austin, Texas, within the period prescribed by the statute.

Respectfully submitted,

J. THOMAS SULLIVAN

HENRY J. ACKELS
ATTORNEYS FOR THE PETITIONER
404 LANDMARK CENTER
1801 NORTH LAMAR
DALLAS, TEXAS 75202
(214) 748-2468

O R D E R

ON THIS 30 day of March, 1981, came on to be heard the foregoing motion of the Petitioner, and the Court having considered the pleadings and the law, is of the opinion and it is hereby ordered that the same be:

~~GRANTED~~ DENIED TO WHICH PETITIONER EXCEPTS.

JAMES K. ALLEN, JUDGE PRESIDING

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing pleading has been served upon W.T. Westmoreland, Attorney for Respondent, on this 17 day of March, 1981, by PERSONAL SERVICE/MAIL.

MOTION FOR COMPLIANCE WITH ARTICLE 44.34, CCP
PAGE TWO.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above NOTICE OF APPEAL TO SUPREME COURT OF UNITED STATES has been served upon the parties listed below by depositing same in a United States post office mailbox, with first-class postage pre-paid and addressed to the following parties:

The Hon. Mark White
Attorney General for the State of Texas
P.O. Box 12548
Austin, Texas 78711

The Hon. James K . Allen
Judge, Criminal District Court No.5
Dallas County Courthouse
Dallas, Texas 75202

The Hon. Henry Wade
District Attorney for Dallas County, Texas
Dallas County Courthouse
Dallas, Texas 75202

The Hon. Don Byrd
Sheriff of Dallas County
Dallas County Courthouse
Dallas, Texas 75202

Henry J. Ackels
Attorney for Appellant
JONATHAN BRUCE REED
1801 N. Lamar
404 Landmark Center
Dallas, Texas 75202

NO. F79-1447-PL

JONATHAN BRUCE REED, Appellant	I	IN THE CRIMINAL DISTRICT
VS.	I	COURT NO. 5 OF
THE STATE OF TEXAS, Appellee	I	DALLAS COUNTY, TEXAS

ORDER GRANTING NEW TRIAL

BE IT REMEMBERED that on this the 21st day of November, 1980, the Court had before it the Record on Appeal in the above styled and numbered cause and the Court, having examined the record and the briefs filed both by the Appellant and the Appellee, is of the opinion that the Defendant should be granted a new trial herein, and the same is so Ordered by the Court.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED by the Court that the verdict and judgment of conviction herein rendered and entered against the said Appellant, Jonathan Bruce Reed, at a former day are set aside and vacated, and the said Appellant is granted a new trial in this cause.

IT IS FURTHER ORDERED that the Clerk of this Court shall show by entry in the minutes of the Court this Order granting a new trial herein, and that said Clerk shall refrain from transmitting this Record to the Court of Criminal Appeals of Texas.

James K Teller

JUDGE
CRIMINAL DISTRICT COURT # 5.
DALLAS COUNTY, TEXAS

FILED
NOV 21 1980
BILL SHAW
DISTRICT CLERK, DALLAS CO., TEXAS
DEPUTY

Appendix 4

Exhibit 2

GROUND OF ERROR NUMBER 1

The evidence is insufficient to sustain conviction for capital murder.

Statement

The indictment charged that Appellant committed murder while in the course of committing or attempting to commit robbery and while in the course of committing attempted aggravated rape. (R, 3). The trial court overruled Appellant's Motion to Quash, based upon failure to allege the name of the victim(s) of the underlying felony offenses. (R, 105, 107; SFVD, 17). In its charge, however, the court limited the consideration of the evidence to whether the murder was committed while committing the underlying offenses upon Wadle, who was the victim of the murder. (R, 137). The court, also, in its charge authorized conviction in the disjunctive, charging the jury to convict if it found murder committed either during commission of robbery or attempted commission of aggravated rape. (R, 137).

Argument and Authorities

Appellant contends the evidence is insufficient to support this capital conviction. In other grounds of error, Appellant complains of the actions of the court in overruling his motion to quash and in charging the jury in the disjunctive. In this ground of error Appellant contends that the State failed to establish proof of commission of both of the underlying offenses; and alternatively, failed to prove either of the underlying offenses.

Discussion of the evidence offered in support of the indictment regarding each of the underlying felony offenses alleged is included in the succeeding two grounds of error. In this ground of error, Appellant will summarize those arguments briefly.

Appellant first contends that the State was bound to prove the elements of both underlying felony offenses once it elected to charge both in a capital indictment. Failure to prove the elements of the underlying offense renders

proof insufficient to support conviction for the principal offense charged. Greer v. State, 437 SW2d 558 (Tex.Crim.App. 1969); Vaughn v. State, 530 SW2d 558 (Tex.Crim.App. 1975).

Appellant contends that the State elected to prove both attempted or commission of robbery and attempted aggravated rape and, hence, was bound to prove both underlying offenses beyond a reasonable doubt. In King v. State, #62, 781 (Tex.Crim.App. 2/6/1980), the State elected to charge murder while in the course of committing kidnapping, robbery and aggravated rape, three of the felonies which may support a capital indictment under Section 19.03(a)(2), Texas Penal Code. In commenting on this election while considering the denial of the appellant's motion to quash for failure to name the victims of the underlying offenses, the Court observed:

> "By virtue of the State's additional allegation of aggravated rape, it was necessary that evidence of an attempted commission or commission of that conduct be presented by the State in order to meet its burden of proof."

The language of the Court in King clearly shows that in charging underlying felony offenses in a capital prosecution, the State is bound by its pleading and the trial court cannot lessen the burden upon the State through use of disjunctive instructions authorizing conviction.

Appellant recognizes that the Court has held that an offense may be charged in different ways through the use of multiple counts, Vannerson v. State, 408 SW2d 228 (Tex.Crim.App. 1966), or by allegations describing the offense in different ways in the same count. Steambarge v. State, 440 SW2d 68 (Tex.Crim. App. 1969). Thus, the State may allege the manner and means of committing an offense in different ways so as to preclude a variance between the charging instrument and proof. Rose v. State, 427 SW2d 609 (Tex.Crim.App. 1968).

Thus, Appellant makes no complaint to the alternative allegations regarding the means by which the murder was alleged to have been committed.

Papes v. State, 494 SW2d 910 (Tex.Crim.App. 1973); Shelton v. State, 441 SW2d 536 (Tex.Crim.App. 1969).

However, the charging of the underlying felony offenses does not constitute allegation of different means used to effect murder, nor did the State choose to use multiple counts or separate, differing descriptions of the offense. Instead, the State simply made an allegation charging two of the five underlying felony offenses which may support a capital indictment under Section 19.03(a)(2) of the Penal Code. Therefore, the State elected to allege more than would be necessary to charge the offense, but because the allegation was not merely surplusage, the State was bound by the higher burden which it voluntarily assumed. Burrell v. State, 526 SW2d 799 (Tex.Crim.App. 1975): McClure v. State, 296 SW2d 263 (Tex.Crim.App. 1957). Thus, failure to prove either underlying felony offense alleged will fatally affect Appellant's conviction on this capital charge. Regardless, Appellant contends that the State wholly failed to meet its burden of proof in reference to both of the underlying offenses alleged, and therefore the evidence, in either case, is insufficient to sustain conviction.

Appellant briefly summarizes the evidentiary insufficiency points which are more fully presented in the following two grounds of error. First, the evidence is wholly insufficient to establish an attempt or commission of robbery. The conviction relies upon circumstantial evidence. The evidence fails to show a theft by Appellant or even an attempted theft, much less any act of appropriation without the effective consent of the robbery victim, Wadle. At best, the evidence shows that witness Pursley noticed Wadle's wallet was open on the couch when she returned to the apartment on the date of the offense. (SFT, 192). The wallet was atop other possessions which were stacked in the living room to be taken by Wadle on a flight. (SFT, 232). Some of Wadle's credit cards were outside the purse, but Pursley testified that she thought Wadle, herself, might have gone through the purse. (SFT, 232). This is a reasonable deduction and hypothesis

based upon the evidence. The robbery of witness Pursley, on the other hand, was clearly established through her testimony on re-direct. (SFT, 316). However, this evidence cannot form the basis for conviction, given the trial court's instruction and, taken alone, will not support a conclusion that Appellant robbed Wadle, to the exclusion of all other reasonable hypotheses.

Insofar as the alleyation of ttempted aggravated rape is concerned, there was no evidence of actual or attempted rape in the medical testimony of the State's expert, or in the conclusions he drew in his autopsy report. (SFT, 61-65). The trial court sustained counsel's objection to his testimony regarding his expert opinion of whether rape had occurred or been attempted, (SFT, 55-56), permitting the witness to testify only that in his opinion, a sexual assault had been committed. (SFT, 56-57).

Proof of sexual assault is not sufficient to rule out all reasonable hypotheses other than attempted aggravated rape. An equally reasonable conclusion would be that Appellant attempted to commit aggravated sexual abuse, an offense that would clearly fall within the non-legal term "sexual assault" but could not support a capital indictment under Section 19.03(a)(2).

Based upon the circumstantial evidence available at trial, the State was neither able to show attempted or commission of robbery, or an attempt to commit aggravated rape. Thus, the State failed to meet its burden and Appellant is entitled to entry of judgment of acquittal as to this capital indictment. Burks v. United States, 437 US 1 (1978); Greene v. Massey, 437 US 19 (1978); Ayers v. State, 570 SW2d 926 (Tex.Crim.App. 1978).

GROUND OF ERROR NUMBER 2

The evidence is insufficient to establish proof beyond a reasonable doubt that Appellant committed the offense of murder while in the course of attempting to commit aggravated rape.

Argument and Authorities

Appellant contends by this ground of error that the evidence is wholly insufficient to establish the theory of the offense alleged in the indictment, that he committed murder of Wadle while attempting to commit aggravated rape upon her. (R, 3). The trial court limited consideration of the evidence by the jury to the issue of whether the murder occurred while in the course of attempting to commit aggravated rape of Wadle (R, 137) while the indictment did not allege the name of the victim of the rape attempt.

The record shows that the deceased was found in her apartment, her hands tied (SFT, 240), nude or partially nude (SFT, 240), with cut marks across her breasts and abdomen. (SF, 240). The condition of the body was attested to by Dr. Gilchrist, the pathologist who performed the autopsy of the deceased. (SFT, 47-50). Officer Taylor testified that he recovered the jeans and panties of the deceased, (SFT, 140; SX 11 and 13), and a blouse having buttons torn off (SFT, 141; SX 12) at the crime scene. He also testified that the crime scene was not properly preserved. (SFT, 147). This constitutes the entirety of the physical evidence available at trial.

The State sought to have Dr. Gilchrist testify as to his medical opinion regarding the probability that the deceased had been raped. (SFT, 55). An objection by defense counsel to this testimony was sustained (SFT, 56), whereupon the prosecutor re-phrased his question, inquiring as to whether Dr. Gilchrist had an opinion as to whether the deceased had been raped or sexually

assaulted. (SFT, 56). Again defense counsel objected and the witness was not allowed to complete his answer. Finally, the attorney for the State was permitted to ask the witness whether, in his opinion, the deceased had been sexually assaulted; he replied that she had. (SFT, 56-57) (emphasis supplied).

On cross-examination, the witness admitted that there was no evidence of trauma to the genitalia, (SFT, 61); that there was a tampon in place in the vagina, (SFT, 61); that there was no damage to the external organs, (SFT, 62); and that there was no inclusion in the autopsy report that a sexual assault or rape had been inflicted on the deceased. (SFT, 63, 65).

The witness reiterated his opinion that a sexual assault had occurred, based upon his assessment of damage to the neck, wrist and the lacerations. (SFT, 64). He testified that he drew this conclusion from the other findings in his autopsy report. (SFT, 65-66). He admitted, however, that there was not any evidence of rape in the genitalia of the deceased, Wadle, and that he had not made any test for semen in the bodily orifices of the deceased. (SFT, 67).

Appellant advances two arguments in support of this ground of error. First, the evidence fails to establish the commission or attempted commission of aggravated rape beyond a reasonable doubt. Second, that even should the evidence show, as Dr. Gilchrist testified, that the deceased was sexually assaulted, such a conclusion is still insufficient to meet the evidentiary standard of attempted aggravated rape required in a capital prosecution.

In regard to the first line of thought, Appellant urges the Court consider the question in light of the trial court's instruction that the evidence in this cause is circumstantial, at least in part. (R, 136-137). There is no direct evidence that the deceased was the subject of an attempted aggravated rape.

Initially, Appellant would observe that the offense of rape itself is one resting critically on the circumstances of intercourse and the consent of the victim. Section 21.02(a), Texas Penal Code. Without a showing that the

intercourse occurs under one of the circumstances descr.bed in Section 21.02(b), the offense of rape cannot be established. The offense of aggravated rape, defined in Section 21.03, Texas Penal Code, is predicated on the definition of rape set out in the preceding provision. Hence, the element of consent is critical in any allegation of rape or aggravated rape. There is no evidence that any act of intercourse occurred; that any act of intercourse was attempted; or that any act was done or attempted without the consent of the deceased. While certain matters regarding intent may be inferred from acts done, it cannot be concluded "to a moral certainty" that any attempted act of intercourse committed in the instant case was without the consent of the deceased. It is reasonable that Appellant could have engaged in a consensual act of intercourse with deceased, for example, and then committed murder of her. Without testimony from the deceased or another who witnessed the assault, it cannot be concluded that the acts constitute a murder while in the course of attempting to commit aggravated rape.

Further, the evidence, itself, provides no basis for a conclusion that Appellant attempted to commit aggravated rape of Wadle. There is no showing of semen in the body, no evidence of injury to the genitalia or trauma to that region, and there was no evidence of penetration offered by the State. To hold the evidence to show this intent would permit the State to always allege attempted rape where a murder victim is female and sustained violent injury.

Evidence of commission of the underlying offense in a capital murder prosecution must establish the attempt or commission beyond a reasonable doubt, as the court charged the jury. (R, 137). In King,v. State, #62,781 (Tex.Crim. App. 2/6/1980), the majority held:

> "By virtue of the State's additional allegation of aggravated rape, it was necessary that the evidence of an attempted commission or commission of that conduct be presented by the State in order to meet its burden of proof."

In that case, the victim of the rape testified at trial, establishing all the elements of the offense, as the majority noted.

Here, there is no evidence which establishes a non-consenting act or attempted act of intercourse without the victim's consent, nor is there any evidence from which a fair inference can be drawn that Appellant even intended an act of rape.

In the absence of evidence, the State failed to meets its burden of proving that the murder of Wadle occurred during an attempted aggravated rape.

Second, even assuming Dr. Gilchrist was competent to testify to the legal conclusion that Wadle was sexually assaulted, the trial court, in sustaining defense counsel's objection, held his testimony that rape had been committed or attempted, incompetent.

A finding that sexual assault has been committed or attempted will not sustain the conclusion that rape has been committed or attempted. Appellant cites the Court's opinion in Collins v. State, #58,247 (Tex.Crim.App. 11/21/1979) in support of this argument. Sexual assuait could include rape, as Judge Tom Davis concluded, but "it is clearly not limited to so narrow a definition." Critical to the panel's consideration in Collins was the fact that the indictment alleged rape of a child, yet the evidence failed to show penetration. The panel held that the prosecutrix's testimony, even coupled with other probative evidence, could not suffice to disprove every outstanding reasonable hypothesis except that of the guilt of the accused.

Appellant asserts that the reasoning put forward in Collins is controlling in the instant case. The conclusion that the evidence does show a sexual assault gives rise to the inference that attempted aggravated sexual abuse, as defined in Section 21.05 of the Penal Code, rather than attempted aggravated rape was committed. Such an alternative hypothesis, clearly reasonable under the

evidence, would preclude a capital prosecution, since the applicable statute, Section 19.03(a)(2) does not include aggravated sexual abuse as a felony which will support a capital indictment.

Finally, Appellant would argue that the trial court itself ruled, as a matter of law, that Dr. Gilchrist could not give competent testimony concerning an attempted aggravated rape, in sustaining counsel's objection to the question posed by the prosecution. Consistent with the rulings of the trial court, the attorney for the State argued in final argument that the deceased was a victim of sexual assault (SFT, 1053, 1054, 1058), rather than rape or attempted rape, a specific legal term of art alleged in the indictment.

A showing of sexual assault will not support a finding of rape. Thus, in a case in which the State relies upon circumstantial evidence, the State failed to discharge its burden in failing to establish through physical evidence and testimony that Appellant committed murder while attempting to commit aggravated rape. Appellant is, therefore, entitled to reversal and entry of judgment of acquittal on this capital indictment. Burks v. United States, 437 US 1 (1978); Greene v. Massey, 437 US 19 (1978); Ayers v. State, 570 SW2d 926 (Tex.Crim.App. 1978).

GROUND OF ERROR NUMBER 3

The evidence is insufficient to establish proof beyond a reasonable doubt that Appellant committed the offense of murder while in the course of committing robbery.

Argument and Authorities

Appellant contends by this ground of error that the evidence is insufficient to support a finding of guilt on the theory of capital murder put forward in the indictment (R, 3) and the court's charge (R, 137) which authorized conviction upon finding commission of murder while in the course of committing or attempting to commit robbery. Such a theory of capital murder is recognized by statute. Section 19.03(a)(2), Texas Penal Code.

The trial court, in its charge, limited consideration of the evidence to the issue of whether proof established that Appellant did, in fact, cause the death of Wadle while in the course of committing or attempting to commit robbery of Wadle. (R, 137). This limiting instruction is critical, in that evidence introduced at trial demonstrated that Wadle's roommate, the closest witness, in terms of time and proximity to the murder, was robbed by the assailant. The robbery of the witness, Pursley, was established by the prosecutor on re-direct. (SFT, 316). By limiting the theory of the offense to the robbery of Wadle, the evidence showing the robbery of Pursley, would not afford a basis for conviction, consistent with the charge of the trial court.

No other evidence was introduced by the State which demonstrated the commission of an act of robbery, as that offense is defined in Section 29.02, Texas Penal Code. Witness Pursley testified that when she returned to her apartment, which she shared with the deceased (SFT, 178), on November 1, 1978, she observed Wadle's possessions in the living room. (SFT, 192). The testimony was offered before the jury. (SFT, 232). Pursley testified that Wadle's wallet was visible on the couch, that some of its contents were exposed and that she

thought Wadle might have gone through the wallet in preparation for a flight. (SFT, 232).

There was no evidence offered to show that Appellant committed the theft of any of Wadle's possessions or property; nor was there evidence that he attempted to commit robbery by either threatened acts injurious to Wadle or acts committed upon Wadle in the course of committing theft. There was no testimony from Pursley that Wadle had been robbed of property or money as a result of the episode nor was there evidence that Appellant sought to commit theft through any threat or violent act upon Wadle.

Additionally, Officer Taylor, an investigating officer on the scene (SFT, 99-102) testified that while he found the contents of Wadle's purse dumped out on the couch and possibly gone through, he was not able to lift any identifiable prints off the contents of the purse. He was not able to testify that property was missing, nor was there any evidence introduced at trial showing property belonging to Wadle to have been found in Appellant's possession.

There is, thus, no evidence demonstrating that Appellant attempted or committed robbery upon Wadle, the theory of the offense authorizing conviction in the court's charge. In the absence of such evidence which would establish proof of the underlying offense of robbery beyond a reasonable doubt, Appellant is entitled to reversal and entry of judgment of acquittal on this capital indictment. Burks v. United States, 437 US 1 (1978); Greene v. Massey, 437 US 19 (1978); Ayers v. State, 570 SW2d 926 (Tex.Crim.App. 1978).

GROUND OF ERROR NUMBER 4

The evidence is insufficient to support conviction for a capital offense for the reason that it wholly fails to show an intentional act of murder.

Argument and Authorities

The evidence fails to demonstrate that the murder alleged was committed intentionally, as required by Section 19.03(a)(2), Texas Penal Code. The intentional killing of a person during the course of commission of the listed felony offenses serves to distinguish the capital offense from non-capital murder prohibited by Section 19.02(a)(3) of the Code.

The following factors serve to raise a reasonable doubt as to whether the murder of Wadle constituted a capital, rather than non-capital offense of murder:

1). No prior relationship of Appellant and deceased was shown which would supply any motive for the murder;

2). There was no evidence Appellant used force to enter the victim's apartment. (SFT, 103);

3). The lacerations on the body of the deceased were not serious in terms of loss of blood. (SFT, 47-49);

4). The victim lived through the assault and was treated at the hospital prior to her death. (SFT, 54, 57);

5). The actual physical cause of death of the victim was pneumonia. (SFT, 57);

6). The other victim assaulted, Pursley, lived through the assault. (SFT, 249-251).

The evidence indicates that while Appellant had every opportunity to insure the death of the victim through stabbing or otherwise completing the act of murder at the scene, he did not do so. Further, he left the victim of the second assault alive when he left the apartment. Even assuming the evidence most

favorably to the State, it is not sufficient to show that the act was done intentionally rather than knowing. Since the culpable mental state is a critical element of the offense, Appellant contends that failure of the State to offer evidence that the murder was intentionally committed is fatal to the conviction. This act of murder could have supported conviction under Section 19.02(a)(1) or (3) as easily as under the capital provision of 19.03(a)(2). The burden lies upon the State to prove, rather than upon Appellant to disprove, that the culpable mental state requisite to a capital offense accompanied the act of murder. Thus failing, Appellant is entitled to judgment of acquittal on this capital indictment. Burks v. United States, 437 US 1 (1978); Greene v. Massey, 437 US 19 (1978).

EX PARTE RICHARD SAMUEL HUFFHINES Habeas Corpus Application

NOS. 60,749
60,750
60,751

From DALLAS County

O P I N I O N

These three cases are before us as appeals from denial of relief sought by three separate applications for writ of habeas corpus pursuant to Chapter 11, V.A.C.C.P., which were consolidated for purposes of hearing by the habeas court. Just as joinder for hearing was convenient and appropriate, so we deem it meet and proper to decide the appeals in a single opinion. We affirm the denial of relief in each cause.

October 29, 1976, petitioner was arrested in Dallas by officers of the Highland Park Police Department. Thereafter he was charged with three different offenses: unauthorized use of a 1976 Cadillac Seville automobile that he was driving on the occasion of his arrest; possession of a firearm silencer found in the Cadillac automobile; unauthorized use of a 1975 Oldsmobile automobile on or about April 26, 1976. It is asserted in briefs but we cannot know from the record[1/] that

---

1/ The record before us is woefully inadequate to support many factual statements made in the only brief submitted on the habeas corpus issues. It consists of the respective transcripts, including a supplemental one in the weapons case, prepared by the district clerk; the statement of facts reporting proceedings had at the consolidated hearing; a single volume of statement of facts reflecting proceedings had during a trial on the merits of the weapons case; appellant's brief in that case; and petitioner's memorandum of law filed post-hearing in the habeas court. Throughout appellant's brief and petitioner's memorandum there are references to sources such as "S.F. Vol. II" that are simply not included in the materials filed with the Clerk of this Court. Moreover, likewise omitted are papers that were offered and admitted by agreement in connection with the habeas hearing, e.g., all pre-trial motions relating to the weapons case, pending indictments for the years 1977 and 1978 and official court records for each of the three pending causes. The Court has not been favored with any communication from the State, perhaps because an appellate brief, as such, has not been filed by petitioner. Laboring under such a handicap, we barely resist the temptation to give short shrift to petitioner's contentions. (All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.)

on or about November 5, 1976, upon being taken before a magistrate petitioner requested an examining trial, and a week or so thereafter reasserted that request; however, an examining trial was never held. December 6, 1976 the grand jury returned three indictments against petitioner, one on each of the respective charges. Confined in the county jail and claiming indigency, December 9, 1976 petitioner requested appointment of counsel but, he claims, not until February 24, 1977 was an attorney appointed to represent him. Meanwhile, February 21, 1977, each indictment was superseded by a re-indictment that included an enhancement allegation.

Dissatisfied with appointed counsel, petitioner elected to represent himself and beginning January 14, 1977, so petitioner asserts, began to file pre-trial motions - none of which as titled by him appears to seek a speedy trial.

August 22, 1977, the weapons charge was tried before a jury, petitioner representing himself with assistance from court-appointed counsel. He was convicted and punishment was assessed by the jury, upon his election, at 30 years confinement. Upon being sentenced, petitioner gave notice of appeal and, after several extensions of time, his appellant's brief was filed with the clerk of the trial court July 5, 1978. July 12, 1978, the grand jury returned a second re-indictment in each of the automobile cases. So far as our record reveals, neither automobile case has been tried.

September 13, 1978, "having decided from the record and the briefs filed therein" that it should do so, the trial court ordered a new trial in the weapons case, and set it for

trial October 23, 1978.

September 20, 1978, the instant applications for writ of habeas corpus were filed and set for hearing October 2, 1978.

As to the weapons case, the application seeks release from restraint on grounds that the State is barred from further prosecuting petitioner because of eight stated reasons, including failure to grant a constitutionally provided speedy trial and, second, denial of constitutional guarantee against double jeopardy. In the automobile cases, he asserts three common reasons, one of which is failure to grant a speedy trial.[2/] At the hearing on his applications, petitioner called adversely as his principal witness the assistant district attorney to whom the indictments were assigned for investigation and prosecution, drawing from him testimony concerning the bases for obtaining the several re-indictments, his state of readiness for trial on various occasions, his awareness of the death or unavailability of the respective persons initially alleged as owners of the automobiles in those cases and reason for the delay in obtaining corrective indictments in them, his failure to press for trials in the absence of a motion seeking a speedy trial and concerning an occasion on or about August 15, 1977 when the State announced ready in the weapons case but thwarted

---

[2/] The other two reasons are: The State, either intentionally or willfully and wantonly has prejudiced rights to a fair trial by denial of reasonable bond, access to obtain reasonable bond, right to an examining trial and right to effective assistance of appointed counsel and, two, law enforcement officers and prosecutors have "committed acts of such an unethical and prejudicial nature as to preclude prosecution." Without a full record, see note 1, supra, we cannot evaluate the contentions, even if proper for determination in a habeas corpus proceeding.

request of petitioner that the Cadillac automobile case be joined for trial with it by announcing not ready. The thrust of his examination of the prosecuting attorney was directed to his "bad faith" in not proceeding earlier to trial. After receiving a post-hearing brief filed October 9, 1978 the habeas court denied relief in each case by order dated November 21, 1978 [3/] - and "after hearing the evidence submitted [4/]" opined that petitioner is legally held in custody and under the restraint of his liberty, denied relief and remanded him to the custody of the sheriff.

The trial of the weapons case was passed by agreement and twice re-set by agreement, right to speedy trial being waived during a period from December 11, 1978 to January 22, 1979. On that date the case was ordered held for trial to January 29, 1979 at which time petitioner was not ready and presented a motion for continuance that was overruled. The jury trial that ensued terminated in a mistrial declared February 6, 1979, when the trial court determined that the jury was evenly divided and could not agree on a verdict.

3/ Inter alia the order recounts that the judge examined the writ and return and "all papers and documents attached thereto" - none is attached to any return appearing in the records before us.

4/ Again, many papers and other documentary evidence were offered and admitted by agreement at the habeas hearing that are not included in the records before us. See footnote 1, supra. Manifestly, as an appellate court, we cannot review and should not revise determinations of a habeas court without having before us the evidence the court considered in reaching its conclusion.

In his post-hearing memorandum of law petitioner has distilled his claims for relief to failure to grant a constitutional speedy trial and denial of protection against double jeopardy - invoking both the United States Constitution and the Texas Constitution.[5/]

While the writ of habeas corpus is "a writ of right" never to be suspended, Art. I, §12, Texas Constitution, its object is to relieve from presently illegal restraint and detention rather than to afford redress for discernible errors, Ex Parte Coupland, 26 T. 387 (1862), Ex Parte Trader, 24 Tex. App. 393, 6 S.W. 533 (1887). Thus it is settled that a writ of habeas corpus cannot serve the office of an appeal, writ of error, certiorari, mandamus, prohibition or other extraordinary writs, nor deal with errors or irregularities which render proceedings merely voidable; it lies to secure a release where the proceedings are absolutely void. See, e.g., Ex Parte Martinez, 66 Tex.Cr.R. 1, 145 S.W. 959, 962-963 (Tex.Cr.App. 1912). Accordingly, this Court has held consistently, and as recently as Ex Parte Trillo, 540 S.W.2d 728, 733 (Tex.Cr.App. 1976), that the question of denial of right to speedy trial is not subject to habeas corpus determination but must be raised and decided on direct appeal from a judgment of conviction after a motion to set aside the indictment

---

5/ Although alluding to provisions of the Texas Speedy Trial Act, neither the applications for writ of habeas corpus nor the memorandum of law in support of them invokes and relies directly on its provision - no doubt because they were filed and the hearing held, October 2, 1978, within the 120 days from July 1, 1978, permitted under the Act, Wade v. State, 572 S.W.2d 533 (Tex.Cr.App. 1978).

pursuant to Art. 27.03, V.A.C.C.P., on that ground has been filed, presented and overruled, Williams v. State, 464 S.W.2d 842 (Tex.Cr.App. 1971) and Ex Parte Jones, 449 S.W.2d 59 (Tex. Cr.App. 1970). So also where the application for writ of habeas corpus is brought to obtain discharge under the Texas Speedy Trial Act pursuant to Art. 32A.02, V.A.C.C.P., as the Court has recently held in Ex Parte Delbert, ___S.W.2d___ (Tex.Cr.App., No. 60,922, delivered June 13, 1979).

In Abney v. United States, 431 U.S. 651, 660-663, 97 S.Ct. 2034, 2041, 52 L.Ed.2d 651 (1977) writing for a unanimous court the Chief Justice pointed out:

> "Finally, the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence. To be sure, the Double Jeopardy Clause protects an individual against being twice convicted for the same crime, and that aspect of the right can be fully vindicated on an appeal following final judgment, as the Government suggests. However, this Court has long recognized that the Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to <u>trial</u> for the same offense." (Original empahsis)

Accordingly, the Supreme Court held that pre-trial orders rejecting claims of former jeopardy constitute "final decisions" within the meaning of the jurisdictional prerequisites of the federal statute being construed. Though the Supreme Court was applying a statutory provision governing appellate jurisdiction, the emphasis <u>Abney</u> gives to the constitutional interests and values in the Double Jeopardy Clause of the Fifth Amendment surely inheres in the jeopardy provisions of Art. I, §14 of the Texas Constitution. Were we writing on a clean slate, as well as the rationale of the Supreme

Court in Abney, supra,[7] other cogent policy considerations might impel us to formulate a bar to exposure to jeopardy through a second trial.[8] From the beginning, however, the settled practice in this State has been and is that jeopardy is a special plea to be made by an accused in advance of trial and tried by the trier of facts on the trial on the merits, Articles 27.02, 27.05 and 27.07, V.A.C.C.P. It is in the nature of a defensive plea, and the burden of proving it is on the accused. See cases annotated in Notes 6, 7, 8 and 9 to Art. 27.05, V.A.C.C.P. Accordingly, as succinctly stated in Ex Parte Crofford, 47 S.W. 533 (Tex.Cr.App. 1898):

> "This is not a novel question in Texas. Since the case of Perry v. State, 41 Tex. 488, the decisions have been uniform that the writ of habeas corpus cannot be resorted to for the purpose of discharging an applicant on a plea of former jeopardy. (Citing other authorities)."

Bound as we are by a unwavering line of precedent, yet straining against the binds, we must nevertheless hold that

---

[7] "Obviously, these aspects of the guarantee's protection would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit. Consequently, if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs." 431 U.S. at 662. (Original emphasis.)

[8] One can immediately conceive of many economies in the criminal justice system that would be effectuated in utilizing the expeditious habeas corpus proceedings in deciding the single question of jeopardy in advance of what surely would be an otherwise lengthy trial that may very well produce many other claimed errors, along with the attendant demand on the energies of court, jail and law enforcement personnel that might ultimately prove to have been wastefully expended.

the issue of former jeopardy may neither be raised by petitioner nor decided by this Court on application for writ of habeas corpus.

Still, the statutory mandate for hearing appeals of habeas corpus matters such as the ones before us is that they "shall be heard and determined upon the law and the facts arising upon record," and the design of the appeal is "to do substantial justice to the party appealing," Art. 44.36, V.A.C.C.P. But with the record in the shape it is presented to this Court, described in note 1, supra, we dare not risk an uninformed determination of otherwise important questions, particularly when they may be raised by a fully developed record of pre-trial and trial proceedings.

Petitioner not being entitled to relief from prosecution on the grounds asserted, or on the record here, the judgments of the habeas corpus court below denying relief are affirmed.

PER CURIAM

(Delivered October 10, 1979)

BY: Panel 1, 2nd Quarter, 1979, composed of:

John F. Onion, Jr., Presiding Judge
Truman E. Roberts, Judge
Sam Houston Clinton, Judge